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No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

HOECHST CELANESE CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Fourth Circuit held that it was bound—by decisions of this Court—to defer to an EPA post-rulemaking regulatory interpretation that contradicted the interpretation expressed by EPA's Administrator when he published the rule in 1984. Although finding that Petitioner did not receive constitutionally adequate notice of that EPA interpretation until 1989—five years after the rule was published—the Fourth Circuit nonetheless held that Petitioner faced liability for violating the rule starting just three months after Petitioner finally got "fair notice." If Petitioner had received fair notice from the start, Petitioner would have had up to two years in which to comply. The questions presented are these:

1. Whether this Court's deference standard forces a reviewing court to defer to a post-promulgation, secret interpretation of a rule, developed by an agency without following notice-and-comment rulemaking procedures.

2. Whether a federal court ignores its historical duty to say what the law is by deferring to an agency interpretation that is measured not by reasonableness but by a not "nonsensical" test.

3. Whether basic principles of due process are violated when a regulated entity is given less time in which to comply with a rule than it would have had if it had received good notice *ab initio*.

LIST OF PARTIES TO THE PROCEEDINGS BELOW

Effective January 1, 1998, the name of Petitioner, Hoechst Celanese Corporation, a Delaware Corporation, was changed to HNA Holdings, Inc. (HNA). HNA is wholly owned by Hoechst Corporation, a Delaware Corporation, which is wholly owned by Hoechst Aktiengesellschaft (Hoechst AG), a publicly held corporation organized and existing under the laws of the Federal Republic of Germany. Hoechst AG's shares and depository receipts are traded on the Frankfurt, London, Amsterdam, Brussels, Luxembourg, Paris, Vienna, Zurich, Tokyo and New York stock exchanges.

HNA participates in the following joint ventures:

- IB Chemical Company, a New York general partnership which is 50% owned by VirChem, Inc., a Delaware Corporation which is an indirect wholly-owned subsidiary of HNA and 50% owned by Mitsubishi;
- Hoechst Diafoil Company, a Delaware general partnership which is 66.7% owned by US PET Film, Inc., a Delaware Corporation which is an indirect wholly-owned subsidiary of HNA and 33.3% owned by Diafoil USA, Inc., a Delaware Corporation wholly owned by Mitsubishi;
- Clear Lake Methanol Co. LLC, a Delaware limited liability company which is 50% owned by Celanese Chemicals, Inc., a Delaware Corporation which is an indirect wholly-owned subsidiary of HNA, and 50% owned by Valero Javelina Corporation;
- Clear Lake Methanol Co. LP, a Texas limited partnership which is 49.5% owned by Celanese Chemicals, Inc., a Delaware Corporation which is an indirect wholly-owned subsidiary of HNA, 49.5% owned by Valero Javelina Corporation, and 1% owned by Clear Lake Methanol Co., LLC;

- Fortron Industries, a North Carolina general partnership which is 50% owned by HCC Fortron, Inc., a Delaware Corporation and a wholly-owned subsidiary of HNA, and 50% owned by Kureha KPS, Inc.;
- Polyplastics Co., Ltd., a Japanese corporation which is 45.0% owned by Ticona LLC, a Delaware limited liability company and a wholly owned subsidiary of HNA, and 55% owned by Daicel Ltd., a Japanese corporation;
- DyStar LP, a North Carolina limited partnership which is 49.5% owned by Hoechst Celanese Dyes Company, a Delaware corporation and a wholly-owned subsidiary of HNA, 49.5% owned by Bayer Corporation, and 1% owned by DyStar Corporation, a Delaware corporation which is 50% indirectly owned by Bayer AG and 50% indirectly owned by Hoechst AG;
- Dyneon LLC, a Delaware limited liability company which is 7.6% owned by Hoechst Celanese Fluoropolymer Holdings, Inc., a Pennsylvania corporation and a wholly owned subsidiary of HNA, 38.8% by Hoechst Fluoropolymer Holdings, Inc., a Delaware corporation and a wholly owned subsidiary of Hoechst AG, and 54.6% owned by the Minnesota Mining and Manufacturing Corporation;
- CTE Petrochemicals Company, a Grand Cayman, British West Indies corporation which is 50% owned by Elwood Insurance Limited, a Bermuda corporation and a wholly owned subsidiary of HNA and 50% owned by Panhandle Eastern Corporation;
- Kunming Cellulose Fibers Company Limited, a corporation of the People's Republic of China, which is 30% owned by Celanese Far East Limited, a Hong Kong Corporation and an indirect wholly owned subsidiary of HNA, and 70% owned by Chinese investors;

- Zhuhai Cellulose Fibers Company Limited, a corporation of the People's Republic of China, which is 30% owned by Celanese Far East Limited, a Hong Kong Corporation and an indirect wholly owned subsidiary of HNA, and 70% owned by Chinese investors;
- Nantong Cellulose Fibers Company Limited, a corporation of the People's Republic of China, which is 30.7% owned by Celanese Fibers Operations Limited, a Delaware Corporation and an indirect wholly owned subsidiary of HNA, and 70% owned by Chinese investors;
- AQF Technologies, LLC, a Delaware limited liability company which is 85% owned by AQF Holding, Inc., a Delaware corporation and a wholly owned subsiidary of HNA and 15% owned by BBA US, Inc.

HNA has significant ownership interest in the following publicly traded companies:

- Celanese Canada, Inc., a Canadian corporation, 56.2% owned by Celanese Overseas Corporation, a Delaware Corporation and a wholly-owned subsidiary of HNA. The remaining 43.8% are owned by third parties. The shares of Celanese Canada are publicly traded on the Montreal and Toronto stock exchanges;
- Grupo Celanese SA, a Mexican corporation, is 40% owned by HNA, 11.1% owned by Hoechst Corporation, and 48.9% owned by third parties. The shares of Grupo Celanese are publicly traded on the Mexican stock exchange;
- Interactive Radiation, Inc., a New Jersey Corporation is 21.6% owned by HNA and 78.4% by third parties. The shares of Interactive Radiation are publicly traded on the over the counter market.

HNA has investments of less than 7.5% in the following companies:

- MBW Ventures Limited, a Michigan limited partnership—2.7%
- NPC Services, Inc., a Louisiana corporation—4.3%
- Japan/US Venture Partners, a California limited partnership—6.7%
- Tortuga Casualty Co., a Grand Cayman corporation —4.76%
- United Insurance Company, a Grand Cayman corporation—5.0%
- Delta Holding Inc., a Delaware Corporation—3.1%

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Petitioner, Hoechst Celanese Corporation (HCC), prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-33a) is reported at 128 F.3d 216 (1997). The district court's decision (App. 34a-72a) is reported at 964 F. Supp. 967 (D.S.C. 1996).

JURISDICTION

The court of appeals' opinion and judgment were entered on October 27, 1997. App. 76a. A timely petition for rehearing and suggestion for rehearing en banc was denied by an order of the court of appeals entered

on December 23, 1997 (App. 74a-75a). This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

This case involves portions of Clean Air Act § 112 (App. 77a-84a)[1] and 40 C.F.R. Part 61 (App. 123a-124a).

STATEMENT OF THE CASE

This petition concerns the meaning of an exemption contained in a rule promulgated by the Administrator of the Environmental Protection Agency (EPA) on June 6, 1984, as part of benzene emission standards known as the National Emission Standard for Equipment Leaks (Fugitive Emission Sources) of Benzene (the benzene NESHAP). App. 85a-155a. Because the standards called for covered sources to make many changes at their plant sites, those subject to the NESHAP could seek up to two years in which to meet the rule's requirements. App. 78a-79a; 83a; 156a.

The benzene NESHAP expressly exempts from coverage any equipment in benzene service that is located at a plant site designed to "use" up to 1,000 megagrams (1,000 metric tons) of benzene per year. 40 C.F.R. § 61.110(c) (1997), App. 123a-124a. In 1984, four of Petitioner's plants employed benzene in their processes, and Petitioner sought to find out whether or not its plants were exempt. To do that, Petitioner needed to determine what the exemption meant by "use" of benzene. At that time, Petitioner's four plants—including the Celriver Plant in South

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[1] Those parts of § 112 at issue in this case were not changed in any meaningful way by the 1990 Amendments to the Clean Air Act; however, relevant portions of 112 were renumbered by the 1990 Amendments. Thus what was § 112(c)(1)(B) of the pre-1990 Clean Air Act (42 U.S.C. § 7412 (1988)) is § 112(f)(4) of the Act as amended in 1990. 42 U.S.C. § 7412 (1994). Both versions are in the appendix. App. 78a-79a; 83a.

Carolina—recycled benzene: that is, they used the same benzene over and over within internal plant processes.[2]

To determine the meaning of "use"—and thus to learn whether its four plants were exempt from the benzene standards—Petitioner looked to the words in the exemption, to the rule's preamble, and to other documents in the rulemaking record. All indicated that "use" meant the amount of benzene "consumed" or the amount of benzene "in inventory" at a plant site. See App. 50a-51a, 63a-64a. By either measure, Celriver—which annually consumed and had in inventory far less than 1,000 megagrams of benzene—was exempt. App. 42a.

Petitioner sought and received further confirmation of its reading of the rule when it questioned regulators with respect to two of its Texas plants: the Bishop Plant and the Pampa Plant, which then both recycled benzene in a manner comparable to Celriver. In both the Bishop and Pampa cases, state regulators and EPA Region 6 officials confirmed in writing to HCC that to determine the amount of benzene "used" at a plant site, one looked at either the amount of benzene consumed or kept in inventory at the site. Again, under either test, Celriver was exempt. *Id.*

In the years following these communications with HCC, EPA personnel continued to tell members of the regulated community that benzene "use" at a plant site was to be based on a single counting of the amount of benzene annually consumed or kept in inventory at a plant site. The record contains examples of how—between 1984 and 1990—EPA representatives (and state regulators acting as EPA's representatives) repeatedly told HCC and others that the term "use" in the exemption meant either the amount of benzene consumed or in inventory at a plant site. App. 62a, 65a.

But in the five years following promulgation of the 1984 benzene NESHAP, others within EPA began dis-

[2] Since then, Celriver—and Petitioner's Celco and Pampa Plants—have entirely ceased using benzene in their processes.

cussing—internally—an entirely different interpretation of the term "use." Secret EPA memoranda—brought to light during this litigation—showed that after the rule was published, EPA staffers resolved that "use," when applied to plant sites that recycled benzene, would be interpreted to mean the amount of benzene as counted over and over as it recirculated through the plant site. App. 30a-33a. By that approach, a source that had on site only one megagram of benzene which it recirculated 1,000 times would be deemed to have "used" 1,000 megagrams of benzene and would not be exempt. And with no rules or guidance to constrain them as to where or when to recount the recirculated benzene, EPA staffers further undercut the exemption by designating—on an ad hoc basis—multiple places inside a plant where the recirculated benzene would have to be counted. By counting recirculated benzene at multiple points within a plant, even one megagram of benzene could quickly multiply into millions of megagrams of benzene; and the exemption would be extinguished. App. 33a.

The staff's count-the-circulating benzene—or "multiple counting" [3]—approach gave EPA the absolute power to interpret the exemption out of existence at whim. To illustrate, here is how EPA's interpretation would work in determining the amount of oil "used" by an automobile engine that holds only six quarts of oil and that neither leaks any oil, burns up any oil, or otherwise consumes any oil. Though most people would say that the engine uses only six quarts of oil, under EPA's approach, the amount of oil the car used would be equal to six quarts

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[3] The term "multiple counting" does not appear in the rulemaking record since such an approach was not contemplated when the rule was adopted. EPA itself coined the term "multiple counting" in a subsequent rulemaking on benzene waste operations. There, after considering comments from the public, EPA rejected any multiple counting approach and called for counting "benzene quantity in a waste stream . . . only once without *multiple counting* . . . ." 40 C.F.R. § 61.342(a) (1997) (emphasis added) (App. 173a).

times the number of times the six quarts circulate within the engine. If you counted the oil at only one point within the engine, the amount of oil "used" could reach hundreds of thousands of quarts a year. And if you counted the oil at two, four, or more counting points within the engine, then the oil used would be two, four, or more times greater —potentially amounting to millions or billions of quarts of oil used. Thus, at the whim of the person making the calculation, the engine could be found to be using vast amounts of oil each year even though the amount of oil actually in the engine was never more than six quarts. *See* App. 33a; 58a n.12.

Because EPA staff's multiple counting interpretation of the exemption was never published,[4] HCC did not learn of it until many years after the benzene NESHAP was promulgated. In August 1989—five years after the NESHAP went into effect—EPA's southeastern office, Region 4, told HCC of one version of a multiple counting interpretation, saying that under that interpretation, Celriver was not exempt from the benzene NESHAP.

At the time, HCC questioned how EPA could interpret the exemption as it did, particularly in light of the language of the 1984 rule, including preamble language which flatly contradicts any multiple counting approach. Significantly, there is not one example in the rulemaking record that discusses how to count circulating or recycling benzene. This omission is telling since agencies typically give examples—in the record—demonstrating what the regulated community is expected to do. But this rulemak-

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[4] Indeed, the internal Agency memoranda that supposedly set out the multiple counting interpretaion have still not been published, even though the Administrative Procedure Act (APA) notice-and-comment rulemaking procedures apply to any "agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . . ." 5 U.S.C. § 551(4) (1994).

ing record is silent with respect to measuring "use" by any method other than what is consumed or what is on hand.[5]

Despite its belief that Region 4's counterintuitive interpretation of the rule was *not* the interpretation of the rule intended by EPA's Administrator at the time he published the benzene NESHAP, HCC—after it learned of EPA staff's reading—agreed voluntarily for Celriver to meet the terms of the NESHAP as read by the Region 4 staff. In early 1990, HCC provided Region 4 with a comprehensive compliance schedule that called for HCC not only to meet but to exceed the terms of the NESHAP at Celriver and to do so within approximately two years. HCC's proposed time to comply was consistent with the Clean Air Act and with EPA's own rules, which said that affected sources could seek up to two years in which to meet the terms of the NESHAP.[6]

EPA voiced no disapproval of HCC's proposed compliance schedule. And HCC met that proposed schedule: by September 1991, Celriver had actually exceeded the terms of the benzene NESHAP even as interpreted by EPA's staff. Nevertheless, EPA decided to sue HCC and to seek penalties from HCC for violating the rule. After

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[5] The absence in the 1984 NESHAP of examples of how to count circulating benzene lies in sharp contrast to the examples that EPA included in its rulemaking on benzene waste operations. *Compare* 40 C.F.R. §§ 61.342 and 61.355 (1991), as adopted by EPA in 1990 (App. 157a-172a) *with* the current version of § 61.342(a), which was changed, following public comment, to make it clear that calculations were to be done "without multiple counting." App. 173a.

[6] The relevant portions of Clean Air Act § 112 (App. 78a-79a; 83a) and 40 C.F.R. § 61.05(c) (App. 156a) provide that the NESHAP rules "shall not apply" until 90 days after the rule's effective date and that EPA may grant a waiver giving affected sources up to two years in which to comply with the rules. Plants receiving waivers were not deemed to be in violation of the NESHAP after the 90th day. Rather, such plants were excused from having to comply during the period of the waiver.

four years of proceedings, the district court disposed of the liability phase of the case on cross-motions for summary judgment.

The district court acknowledged that from 1984 to 1990 EPA had interpreted the exemption many different ways. App. 62a. But, citing a long line of cases going back to *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965) (App. 38a), the district court ruled that it was compelled to defer to EPA's "present interpretation" of the rule. App. 38a-39a; 69a.

The district court, however, commented on all the evidence in the rulemaking record supporting Petitioner's reading of the rule and indicating that EPA representatives had previously interpreted the rule as Petitioner did. App. 50a-51a; 62a. Because of this, it ruled that HCC had not, in 1984, received constitutionally required fair notice of EPA's multiple counting reading of the rule and thus could not be found liable or penalized for having violated the rule when it was published. The district court then held that even if HCC received actual notice of a multiple counting interpretation later on, it should still not be held liable for violating the NESHAP because it was "undisputed" that Celriver had "acted responsibly to meet—and far exceed—the terms of the NESHAP" within the two-year period to which HCC would have been entitled had EPA given HCC fair notice of its regulatory obligations in June 1984. App. 69a-70a.[7]

Both sides appealed. The Fourth Circuit found record support for HCC's reading of the exemption (App. 15a), and it recognized that EPA had interpreted its rule inconsistently (App. 15a n.6). But, citing many of the deference cases relied upon by the district court (App. 7a),

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[7] In reaching its decision, the district court considered that if HCC had received constitutionally adequate notice at the right time, it would have had the chance to seek—and in all likelihood to secure—a waiver giving it up to 24 months in which to come into compliance. App. 69a-70a.

the Fourth Circuit concluded that it was bound to defer to EPA's present interpretation of the rule so long as EPA's interpretation was not "nonsensical." App. 8a.

The Fourth Circuit then affirmed part of the district court's "fair notice" holding. It found that until August 1989, HCC had not received fair notice of EPA's reading of the rule and thus was not liable for failing to comply with the standards between 1984 and 1989. App. 16a-20a. But though the district court had concluded that HCC should not be penalized even if it did get actual notice of the interpretation in 1989, the Fourth Circuit concluded that HCC could be penalized beginning 90 days after that court said HCC had notice of EPA's reading of the rule. App. 26a. In other words, the Fourth Circuit held that from the moment in 1989 when it concluded HCC received actual notice of EPA's current interpretation, HCC had only 90 days in which to cure all deficiencies. On the ninety-first day and thereafter, the Fourth Circuit held that HCC could be subject to penalties to be determined by the district court. *Id.*

By holding HCC liable so soon after it said HCC had actual notice of EPA's interpretation, the Fourth Circuit has put HCC in a much worse position than it would have been in had EPA given HCC constitutionally adequate notice from the outset. That part of the appeals court's ruling thus takes away much of the force and effect of its lack-of-fair-notice ruling.

REASONS FOR GRANTING THE WRIT

The Fourth Circuit's decision in this case raises several important principles: that agencies are required to use notice-and-comment rulemaking to develop sound regulations and to tell regulated entities what is expected of them; that courts have the power and the duty to say what the law is; and that fair notice must include within it a reasonable amount of time in which to comply once notice is given. Here, in accordance with its legal obliga-

tions, EPA put a regulation out for comment, made a record, provided examples of how the rule would work, and then put the rule into effect. But then, EPA staffers decided that they did not like what was written down. Instead of going through another round of rulemaking in order to change the rule, though, they proceeded to change the rule by re-interpreting it without the benefit of public notice and comment. That is the only explanation for how far fewer than 1,000 megagrams of benzene could suddenly come to be counted as many times more than the 1,000 megagram exemption threshold.[8]

When HCC asked the federal courts to e amine EPA's conduct, the courts replied that the Supreme Court of the United States required them to defer to an agency's interpretation of its own regulations. The Fourth Circuit has read the case law to say that a not "nonsensical" test can be used to examine an agency's interpretation of its rules.

Put into plain English, the Fourth Circuit's test for deference means no more than "was the agency's position not absurd or not ridiculous." Put more bluntly, the test is the "not stupid" test. But that is a far, far more minimal standard for deference than this Court expressed in *Udall v. Tallman* or elsewhere. And, as will be shown below,

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[8] This is illustrative of what can happen when agencies are allowed to avoid statutory rulemaking safeguards. The regulation and the preamble provide an exemption that is illusory once the unpublished, post-promulgation reinterpretation is discovered and enforced. Moreover, EPA's attempt to change the meaning without going through rulemaking has put EPA in the position of enforcing an approach that—to our knowledge—EPA has consistently rejected as unsound whenever it has been considered in notice-and-comment rulemaking. *See supra* note 5 (EPA's benzene waste operation rules); 52 Fed. Reg. 21157 (June 4, 1987) (application instructions under the Emergency Planning and Community Right to Know Act specifically precluding multiple counting). *See also* App. 51a (describing EPA's rejection in another rulemaking of " 'processing rate,' a version of multiple counting," because it was "difficult to establish").

the Fourth Circuit is not the only court of appeals that has dropped the standard for deference below the floor. In order to get the federal courts back on track, this Court must make clear to them that they have no duty to yield to anything and everything that an agency conjures up just because the agency calls it an interpretation or just because what the agency says is not "nonsensical."

As things now stand—with federal courts thinking that they must defer to virtually everything an agency does—the federal courts have abdicated their power and duty to say what the law is. This leaves federal agencies with the authority both to make up law and then to interpret that "law" as they wish in individual cases.

This, though, stands on end the basic constitutional principle that, in the United States, it "is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). It is the courts that tell federal agencies whether they have stayed within the bounds of the law.

Though deference has its place among the tools that courts use to decide cases, if courts defer as a matter of course, they run the risk of letting an agency become the arbiter of what the law is. Deference can result in—and we believe in this case did result in—the impermissible promulgation and retroactive application of secret law with no real forum in which a regulated entity has a chance to correct the abuse.[9] This is certainly true if the test for whether deference is to be accorded is so minimal that all an agency has to do is present, during litigation, an interpretation that is "not absurd," "not ridiculous," "not stupid."

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[9] In an enforcement context, agency enforcement personnel can give "inconvenient" regulatory language a "creative" reading to serve the immediate needs of the litigation, and they can then try to legitimize such a reading by calling it an "interpretation."

Such a weak standard for deference opens the door for an agency to operate without regard to law. Such a weak standard is an invitation for agencies to be corrupted by heady power. The Court should step in to correct this spreading misunderstanding of the deference standard.

I. THIS COURT SHOULD MAKE CLEAR TO THE FEDERAL COURTS THAT *UDALL v. TALLMAN* DEFERENCE DOES NOT MEAN THAT THE COURTS MUST DEFER TO AGENCY INTERPRETATIONS OF REGULATIONS IN VIRTUALLY ALL CASES.

A. The Fourth Circuit and Other Circuits Have Deviated from This Court's Basic Deference Principles.

Federal regulatory law can be complex but—complex or not—the goal of regulatory law is that those doing the regulating speak clearly and say plainly that which they mean to say so that those who are being regulated will know what is required of them. But disputes can arise even with respect to comprehensive, well-written regulations.

In the search for an approach to resolving disputes between regulators and those regulated, this Court decided to give some effect—to defer, in certain circumstances—to agency interpretations of the laws under which they operated and to agency rules and regulations adopted after notice-and-comment rulemakings. But this Court did not say that deference knows no bounds. Rather it said that courts are to defer to agency interpretations only so long as those interpretations are not "plainly erroneous" or "inconsistent" with the underlying rule. *See Udall v. Tallman*, 380 U.S. 1, 16 (1965), *quoting Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (An "agency's interpretation of its own regulations . . . must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation."); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) ("We must

give substantial deference to an agency's interpretation of its own regulations."); *Stinson v. United States*, 508 U.S. 36, 45 (1993); *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 150-151 (1991). *Cf. Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 845 (1984), *reh'g denied*, 468 U.S. 1227 (1984).

Though this Court never indicated that deference was intended to turn the federal courts into rubber stamps for any agency conduct, the federal courts have, over the years, misread the deference cases as imposing upon them the most minimalist of standards when reviewing agency conduct. In this case, the Fourth Circuit has used a not "nonsensical" standard.[10] In a similar vein, the First Circuit has applied a not "mindless, or whimsical" standard. *Associated Fisheries of Maine, Inc. v. Daley*, 127 F.3d 104, 110 (1st Cir. 1997). And the Sixth Circuit has "thrown up its hands" and decried the way in which the deference standard has softened into a virtual legal "quicksand": "The standard has been constantly shifting, steadily sinking, and, from the perspective of the intermediate appellate courts, frustrating." *Ohio State Univ. v. Secretary, United States Dep't of Health and Human Services*, 996 F.2d 122, 123 (6th Cir. 1993), *cert. granted, vacated on other grounds*, 512 U.S. 1231 (1994).

Petitioner submits that the deference standard has become unhinged from its underpinnings. Though it began life as a tool to help courts to evaluate agency rules, it has evolved—indeed transmuted—into an excuse for the

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[10] The Fourth Circuit also said it upheld EPA's multiple counting interpretation because such an interpretation "harmonizes" with the purposes of the Clean Air Act. App. 8a. This misses the point. Of course EPA has the authority to adopt an exemption based on multiple counting, but to do so it must first propose and seek comment on such a rule. EPA did not do that here.

courts to accept any agency interpretations that are not ridiculous.[11]

B. The Agencies—Having Learned That Their Power Has Virtually No Court-Imposed Limits—Have Responded By Running Roughshod Over Both the Statutes Constraining Their Behavior and the Regugated Community.

The fact that the courts defer to agencies almost as a matter of course has not been lost on the agencies. Knowing that they can act almost with impunity, agencies have taken advantage of the situation by first adopting rules that say one thing and then, over time, interpreting them to mean something entirely different. As one court describes it, this allows agencies to take "one view one year and another the next"—all without giving any notice to the public and without following APA and other statutory notice-and-comment procedures for changing agency rules. *See Homemakers*, 832 F.2d at 412.

Another consequence of such wholesale deference is that some agencies have stopped trying to write clear rules in the first instance. Instead, they write "mush" and then give that "mush . . . concrete form only through subsequent, less formal interpretations." *Paralyzed Veterans of America v. D.C. Arena*, 117 F.3d 579, 584 (D.C. Cir. 1997), *cert. denied*, 66 U.S.L.W. 3387 (1998).

This increasing agency audacity—coupled with the deference being paid by the courts to virtually anything an administrative agency says—leaves the regulated community in a perilous situation. While regulated entities try their best to comply with the law, they find themselves

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[11] Though courts have said they will not defer to all agency interpretations, the actual practice of reviewing courts has been to defer to agency interpretations of their own rules "in all but extraordinary cases." *See, e.g., Homemakers North Shore, Inc. v. Bowen*, 832 F.2d 408, 411 (7th Cir. 1987), *citing Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

not being able to get a fix on what the law is.[12] They are subject to the vagaries of shifting agency interpretations, plagued by secret law. They cannot trust the words of a regulation and the illustrative examples used. The rulemaking record serves as no constraint on agency caprice because agencies can—as EPA did here—simply change the law whenever agency staffers change their minds about what they wish the law to be. Even letters or comments from federal and state regulators do not rein in the agency because those representations can be shunted aside. Order needs to be brought back to this situation.

II. THIS CASE PROVIDES AN APPROPRIATE VEHICLE FOR REASSERTING THE PROPER RULES GOVERNING JUDICIAL DEFERENCE TO AGENCY INTERPRETATIONS.

In this case, EPA's Administrator wrote one thing in the 1984 benzene NESHAP and EPA's staff tried to change what the Administrator had written. Here, the staff's internal actions—aimed at avoiding notice-and-comment rulemaking—were exposed through internal EPA memoranda that came to light only because of this litigation. This case puts on display the dangers of federal agencies acting as if they need not answer to anyone, not even to the courts. On this record, the Court will be able to see what EPA published, then measure whether EPA's "present interpretation" reasonably relates to what the public was told. With this case, this Court can replace the limits on deference that have been lost by the lower federal courts.

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[12] Regulated entities wanting to comply with environmental requirements can be stymied if they do not know what they are supposed to do because EPA fails to follow the rulemaking procedures designed to tell them what is expected of them. Judicial deference to agency interpretations in these circumstances encourages EPA to continue to "hide the ball," thus hindering timely compliance efforts and—in turn—interfering with the prompt accomplishment of environmental goals.

A. This Court Should Make Clear That It Is Not Appropriate For Federal Courts to Defer to Agency Interpretations That Defy the Very Language of a Published Rule.

If words in a rule mean what they normally mean, then companies can learn what the rule means—they get notice of what they must do—just by reading it. In this case, both the district court and the appeals court found that HCC's single counting interpretation was a reasonable way to interpret the term "use" in the exemption. Indeed, one of the reviewing judges stated explicitly that the most commonplace and natural reading of the rule's language is that "use" is a single counting concept: it equals the amount of benzene in use and consumed at a plant site during a year. App. 29a. And all the reviewing judges determined that EPA's interpretation of the term "use" was so abnormal that HCC did not get fair notice of that interpretation from the plain language of the rule.

Nonetheless, all the reviewing judges—even the judge who said he believed that EPA's interpretation defied the plain language of the exemption—still felt compelled to defer to the agency's multiple counting interpretation. Such is the strength of the belief among federal judges that they have no choice but to defer to all but the most ridiculous agency interpretations.[13] The Court must correct that misimpression.

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[13] The courts here not only ignored the normal meaning of the words in the rule, but also they ignored *unrebutted* expert testimony about the plain meaning of technical terms in the record describing the rule. Specifically, the courts deferred to EPA's interpretation of enginering terms like "throughput" and "mass balance," even though that required them to ignore those terms' established technical meanings. According to the unrebutted expert testimony of chemical engineers—Dr. James Wei, Dean of the School of Enginering and Applied Sciences at Princeton University and Dr. E. Bruce Nauman, full professor of chemical engineering at Rensselaer Polytechnic Institute—those engineering terms, when applied to a

B. This Court Should Not Allow the Federal Courts to Defer to Latter Day Agency Interpretations that Contradict Agency Explanations Made When the Rule Was Promulgated.

The rulemaking record also contains several examples which show that EPA's Administrator intended "use" in the exemption to mean the amount of benzene "consumed" or "on hand." In one example, the Administrator's statements in the rule's preamble—published as part of the 1984 final rule—definitively equated the concept of "use" in the exemption with "consume." [14] Thus, the most authoritative contemporaneous statements of the Agency's intent support and compel reading the exemption in the way that HCC has read the exemption from the beginning, and they flatly contradict the regulatory interpretation that EPA has advanced in this litigation.

By contrast, EPA could not point to one place in the rulemaking record that contains an example of how to count benzene as it circulates through a plant site. The primary basis for EPA's multiple counting approach was internal memoranda that were written by EPA staff *after* the rule was published and were never subjected to the scrutiny of notice-and-comment rulemaking. App. 11a-12a. Such material is not entitled to deference. The very purpose of notice-and-comment rulemaking is eliminated when an agency can successfully advance post-rulemaking

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plant site as a whole (as called for by the benzene NESHAP exemption), refer to a plant's overall net production or consumption, which are single counting concepts. App. 175a-191a; *see* 47a.

[14] The Administrator explained that the exemption was meant to address the concerns of an unidentified pharmaceutical industry source which was known to recycle benzene in a process that "*consumed* about 325 MG/year [of benzene] during 1981." App. 113a. The Administrator went on to state that, under the terms of the exemption as originally adopted, the possibility that such pharmaceutical operations "could be adversely affected is very small" because "most pharmaceutical plants *use* very little benzene." *Id.* at 113a-114a (emphasis added). *See also* App. 29a-30a.

interpretations that contradict what is in the rulemaking record.

C. The Federal Courts Should Not Defer to the Latest in a Series of Agency Interpretations.

It is not appropriate to defer to an agency interpretation which is but one of several from the agency because when "an agency waffles without explanation, taking one view one year and another the next," this may show that there has been no real decision made by the agency. *Homemakers*, 832 F.2d at 412. Thus when courts face waffling agencies, courts should be "less willing to accept the agency's latest word as authoritative . . . ." *Id.* The latest in a string of vacillations may be no better or no more enduring than a preceding position. In addition, an about-face by an agency may be a telltale sign of an effort either to defy the outcome or to avoid the requirements of notice-and-comment rulemaking. *Id.* To defer to "here today gone tomorrow" interpretations on the part of agencies encourages misconduct by the agencies; it allows them to avoid making up their minds and to play a game of "bait and switch" with the regulated community.[15]

The need to prevent agency staffers from re-writing rules is particularly acute in the case of regulations promulgated under the Clean Air Act. This is so because the Clean Air Act—distinct from other major federal environmental statutes—places the power to make regulations solely in the hands of EPA's Administrator *and expressly prohibits the Administrator from delegating that power.*[16]

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[15] That is what happened here: certain aspects of EPA's multiple counting approach were presented, for the first time, in the government's briefs in support of its summary judgment motion in the district court. *See* App. 41a.

[16] *See* Clean Air Act § 301(a)(1) ("The Administrator may delegate to any officer or employee of the Environmental Protection Agency such of his powers and duties under this chapter, *except the making of regulations*, subject to section 7607(d) of this title,

Consequently, none of the various EPA regional offices can speak with authority as to what a particular regulation means, and the statements of the Administrator take on added significance.[17]

In this case, the Fourth Circuit deferred to an EPA Region 4 interpretation that materially conflicted with the statements made by EPA's Administrator when the rule was published. Moreover, Region 4's interpretation conflicted with statements made by another EPA region in the years following the rulemaking. Region 4's interpretation thus could not be taken as the "authoritative" EPA interpretation of the rule. And only the authoritative agency interpretation could ever be properly accorded deference.

The courts should not be left to think that they must give in to such interpretations. If the courts are left with that impression, the administration of justice will suffer; the role of statutorily mandated notice-and-comment rulemaking will be further eroded; the agencies will become convinced that they are free to chase the regulated community helter-skelter with interpretations *du jour*. The agencies need to be reminded that, "[o]nce a legislative rule . . . is adopted, its substantive provisions may be changed only by compliance with the notice and hearing requirements of the Administrative Procedure Act." *Clean Ocean Action v. York*, 57 F.3d 328, 333 (3d Cir. 1995).

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as he may deem necessary or expedient.") (emphasis added). App. 84a.

[17] The appeals court cited the Supreme Court for the proposition that the "power authoritatively to interpret its own regulations is a component of the agency's delegated law-making powers." App. 7a, *quoting Martin v. OSHRC*, 499 U.S. at 151 (1991). This misses the point that where, as with the Clean Air Act, Congress has placed an agency's "delegated lawmaking powers" exclusively in the hands of that agency's Administrator, then *only* the Administrator can exercise the "power authoritatively to interpret" a rule promulgated under the Act.

III. IN ADDITION, THIS CASE PROVIDES AN APPROPRIATE VEHICLE FOR CONSIDERING WHETHER THE FEDERAL COURTS SHOULD GIVE ANY DEFERENCE TO UNPUBLISHED, POST-PROMULGATION AGENCY INTERPRETATIONS OF AGENCY RULES.

As we have discussed above, the once salutary idea of deferring to agency interpretations of their rules has broken down in the real world of courts and business and administrative regulation. Deference has become a shield behind which agencies are hiding laws made by whim rather than through rulemaking. As deference has left its *Udall v. Tallman* underpinnings and changed into what it has become today, agencies like EPA have forgotten that a "substantive regulation must have sufficient content and definitiveness as to be a meaningful exercise in agency lawmaking" and that it is not "open to an agency to promulgate mush and then give it concrete form only through subsequent less formal 'interpretations.'" *Paralyzed Veterans,* 117 F.3d at 584.

Deference has gotten out of hand, and HCC submits that this Court may want to consider doing away with deference altogether, especially where deference is being given to unpublished, post-promulgation agency interpretations. Although the rationale for giving deference to an agency's interpretation of a *statute* it is charged with implementing has been clearly expressed (see *Chevron,* 467 U.S. at 844), that rationale does *not* apply when the interpretation at issue is an agency's interpretation of a *rule* that the agency itself has devised and promulgated and which may not become public until years after promulgation, often in enforcement proceedings. In HCC's view, the application of the deference standard to cases involving an agency's interpretation of its own rules has never been adequately justified.

In *Seminole Rock*—perhaps the earliest expression of this aspect of the "deference" concept—the Court ob-

served that a reviewing court "must *necessarily* look to the administrative construction of the regulation if the meaning of the words used is in doubt." 325 U.S. at 413-14 (emphasis added). But the Court did not explain why it was "necessary" for the reviewing court to look to the agency's interpretation rather than determine the meaning of the regulation itself, nor did the Court cite any prior decision or other authority for the proposition.

Facing the issue twenty years later in *Udall v. Tallman*, the Court—invoking *Seminole Rock*—asserted that "[w]hen the construction of an administrative regulation rather than a statute is in issue," deference to the agency's interpretation "*is even more clearly in order.*" 380 U.S. at 16 (emphasis added). But again, the Court provided no explanation for why deference was "even more clearly in order" in the case of a regulation as opposed to a statute.

More recently, the Court has attempted to provide some rationale for its deference-to-agency-constructions-of-their-own-rules concept. For instance, in *Martin v. OSHRC*, the Court stated that "[b]ecause applying an agency's regulations to complex or changing circumstances calls upon the agency's unique expertise and policymaking prerogatives," the Court "presume[s] that the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers." 499 U.S. at 151, *citing Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 568 (1980).[18] The Court developed

[18] Broad deference is "all the more warranted," the Court has asserted, when the regulation "concerns 'a complex and highly technical regulatory program,' in which the identification and classification of relevant 'criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns.'" *Thomas Jefferson Univ. v. Shalala*, 512 U.S. at 512, *citing Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 697 (1991). Yet, the relevant question is not who is best positioned to apply a regulation to a "complex" technical situation, but rather, which govern-

this delegation thought in *Chevron*, where the Court suggested that an agency may be deemed to have been delegated the authority to write rules that fill gaps left by Congress.[19]

But where Congress has left a "gap" for an agency to fill, the agency should be required to fill that "gap" through rulemaking that establishes clear and definitive regulatory language. The "very purpose behind the delegation of lawmaking power to administrative agencies" is to " 'resolve . . . ambiguity in a statutory text.' " *Thomas Jefferson Univ.*, 512 U.S. at 525 (Thomas, J., dissenting), *citing Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 696 (1991). Agencies should not be permitted "merely [to] replace[] statutory ambiguity with regulatory ambiguity." *Id.*

It therefore follows from *Chevron* that an agency's chance to exercise its "expertise" and "policymaking prerogatives" comes *only* at the time the agency writes its regulations. But once those regulations have been promulgated, the question of what they mean is a pure question of law that only a court should be allowed to decide. This has been so since the beginning of the Republic: "[I]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); *see also FTC v.*

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mental entity under our constitutional system is ultimately entitled to establish the meaning of laws, including regulations.

[19] The deference afforded agencies under *Chevron*'s second prong is grounded in the principle that, in those situations where Congress has not "unambiguously expressed" its "intent" as to the meaning of a statutory provision, there has been either an explicit or implicit delegation of authority by Congress to the implementing agency to resolve the matter. The " 'power of an administrative agency to administer a congressionally created . . . program,' . . . necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Chevron*, 467 U.S. at 843, *citing Morton v. Ruiz*, 415 U.S. 199, 231 (1974).

Colgate-Palmolive Co., 380 U.S. 374, 385 (1965) (While an "informed judicial determination is dependent upon enlightenment gained from administrative expertise," in the "last analysis the words [of a statute] set forth a legal standard and they must get their final meaning from judicial construction."). Thus, the principle is well established that "[t]he judiciary is the final authority on issues of statutory construction." *Chevron*, 467 U.S. at 843 n.9.

To follow *Chevron's* logic to its conclusion is to see that deference is not appropriate where an agency's post-promulgation interpretation of a *regulation* is concerned. Regulations are laws just as statutes are laws. Like statutes, regulations dictate behavior by those to whom they apply. Like statutes, regulations drive the expenditure of time, of money, of peace of mind on the part of those who are being regulated. Like statutes, if regulations are violated, enforcement proceedings, stop-sale orders, civil penalties, and perhaps even criminal sanctions may follow.

The responsibility for determining the meaning of regulations must rest ultimately not with any element of the executive branch that promulgated them, but with the judiciary. With all due respect, HCC submits that the prospect that EPA should be able to read a rule any way EPA pleases so long as that reading is not "nonsensical" should ring alarm bells in the judiciary, alerting the courts to the very real risk that EPA has gotten "bigger than the law."

Accordingly, to address situations where an agency advocates, during litigation, a regulatory interpretation that differs from the one it presented to the public at the time of rulemaking or where an agency promulgates an ambiguous rule and later (without further rulemaking) reads it to allow only one of several plausible interpretations, HCC respectfully suggests that the Court use this case explicitly to abandon the "deference" principle and direct the reviewing court to determine the single correct

meaning of the provision. That is, if the reviewing court —applying traditional tools of regulatory construction [20]— finds that the agency has indeed advanced the best interpretation of the regulation as promulgated, then that interpretation should be upheld. Otherwise, it should be rejected.

In the instant case, both the district court and the court of appeals upheld EPA's "multiple counting" interpretation of the benzene NESHAP exemption provision on the grounds that HCC had not shown that multiple counting was a "plainly erroneous" reading of the regulatory language. At the same time, both courts found that HCC's single counting interpretation was a reasonable way to construe the exemption. In such circumstances, the courts should have resolved the matter not by simply determining whether "multiple counting" is one of several not "nonsensical" ways to read the exemption, but, rather, by ascertaining whether or not "multiple counting" *is* indeed what the exemption as promulgated means.

In sum, deferring to an agency's interpretation of its own ambiguous regulation does not vindicate any constitutional separation of powers principle or give effect to the agency's supposed expertise in a complex technical field. Rather, it rewards the agency for having failed to meet its obligation to resolve statutory ambiguity through rulemaking. Deference in this context is a perversion of fundamental principles of administrative law. It is an

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[20] Use of traditional tools of regulatory construction would include evaluation of the regulatory language in light of the explanation of the rule in the contemporaneous preamble to the rule published in the *Federal Register*. The preamble to an EPA rule provides singularly authoritative evidence of the agency's intent. *See State of Vermont v. Thomas*, 850 F.2d 99, 103 (2d Cir. 1988). Indeed, the preamble is part of an agency rule. *See* 5 U.S.C. § 551(4) (1994) (definition of "rule" in the APA); 44 U.S.C. § 1507(4) (1994) (Federal Register Act provides that content of the *Federal Register* "shall be judicially noticed.").

abdication of judicial responsibility that this Court should restore.

IV. THIS COURT SHOULD HOLD THAT CONSTITUTIONAL FAIR NOTICE INCLUDES WITHIN ITSELF THE REQUIREMENT THAT ONCE FAIR NOTICE IS GIVEN TO A REGULATED ENTITY, THAT ENTITY MUST HAVE A REASONABLE AMOUNT OF TIME IN WHICH TO COMPLY WITH THE OBLIGATION THAT HAS BEEN NOTICED

In *General Electric Co. v. EPA*, 53 F.3d 1324, 1328 (D.C. Cir. 1995), the court gave voice to the principle that due process requires that a regulated entity have fair notice of what it is supposed to do before it can be penalized for not doing it. Other circuits have voiced similar concepts. *See Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 649 (5th Cir. 1976); *First American Bank v. Dole*, 763 F.2d 644, 651 n.6 (4th Cir. 1985).

The Court should use this case to make clear that the "fair notice" concept established in the *General Electric* line of cases must also necessarily encompass the notion of "timely notice"—*i.e.*, that after an entity is given notice of a regulatory obligation, it must be given a reasonable amount of time in which to meet that obligation without being penalized for getting the late notice. This aspect of the fair notice concept is codified in the notice requirements of the APA. *See, e.g., Secretary of Labor v. Western Fuels-Utah, Inc.*, 900 F.2d 318, 327 (D.C. Cir. 1990). Among other things, the APA says this: "[e]xcept to the extent that a person has *actual and timely notice* of the terms thereof," a person may not in any way be "adversely affected by" any matter—such as an agency interpretation—that is required to be published in the *Federal Register* and not so published. *See* 5 U.S.C. § 552(a)(1) (1994) (emphasis added).

Courts which have analyzed the APA's requirement of "actual and timely notice" have concluded that a regulated entity must be given sufficient time to bring its con-

duct into conformity with the obligations of which it has been put on notice. *See Alliance for Cannabis Therapeutics v. DEA*, 15 F.3d 1131, 1136 (D.C. Cir. 1994), *quoting Northern California Power Agency v. Morton*, 396 F. Supp. 1187, 1191 (D.D.C. 1976). In other words, a regulated entity that establishes that it did not originally receive fair notice must—after finally getting notice—be given sufficient opportunity and time in which to comply with the rule.

The district court's decision in this case is consistent with the foregoing principles, but the Fourth Circuit's is not. The district court concluded that the Clean Air Act and EPA's rules contemplate that those who get notice at the time of promulgation that they are subject to a NESHAP provision could seek up to two years in which to comply with that provision. Therefore, it made good sense for the district court to hold, as it did, that HCC was *not* liable for having violated the benzene NESHAP because Celriver had "acted responsibly to meet—and far exceed—the terms of the NESHAP" within the two-year compliance time-frame to which HCC would have been entitled had EPA given HCC fair notice of its regulatory obligations in June 1984. App. 65a-71a.

The Fourth Circuit, however, did not look back in time to consider the posture HCC would have been in had HCC received fair notice from the beginning. It did not consider that a company that got fair notice from the start (in June 1984) was virtually assured of having 730 days in which to come into compliance.[21] Rather, the Fourth Circuit held that after HCC received actual notice that

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[21] Notwithstanding Congress' statement that EPA "may" grant the waiver, EPA has no discretion to exercise; it *must* grant a waiver when a source makes a showing that satisfies the statutory test. *See, e.g., Ethyl Corp. v. EPA*, 51 F.3d 1053, 1058-59, n.7 (D.C. Cir. 1995). Since HCC could make the statutory showing for its similarly situated Pampa Plant (App. 50a; 56a-57a), it is reasonable to assume that HCC could have made the showing—and received a waiver—at Celriver.

its Celriver Plant was not exempt, HCC had only 90 days in which to meet the terms of the standards at Celriver. And on the 91st day, HCC was liable for Celriver's failure to meet the standards. App. 26a. According to the Fourth Circuit, all HCC's efforts to meet the standards promptly upon being told it was subject to them are irrelevant to whether it is "liable"; such efforts—says the Fourth Circuit—can be taken into account only in a subsequent penalty phase of the litigation.

This "remedy" is not adequate. Even if HCC can, in further proceedings, establish that no monetary penalty is warranted for its 1989-1991 actions (and HCC believes it can), a "violation found is still a significant penalty." *Rollins Environmental Services v. U.S. E.P.A.*, 937 F.2d 649, 654 n.2 (D.C. Cir. 1991) (Edwards, J., dissenting in part and concurring in part). Not only has HCC here been "labeled a 'law breaker,' but this violation can be used against the company in assessing penalties with respect to any future violations." *Id.* In addition, the 4th Circuit's decision forces HCC to incur the potentially substantial costs of the other proceedings that would need to take place before the district court could decide that no monetary penalty is warranted.

Petitioner prays that the Court use this case to make clear that the "fair notice" component of due process means not only that a regulated entity must have actual notice of a rule's meaning, but also that it must not be penalized for getting notice later than it should have gotten the notice. Regulated entities put in the position of HCC—sources that are not timely told of their regulatory obligations—are entitled to avoid the stigma of "lawbreaker." Fair notice requires no less.

CONCLUSION

Important principles of the way administrative agencies do business are on the line here. So too are important principles of justice and fairness. Agencies must know that they are not above the law and that they cannot make law in internal memos and then impose it upon the regulated community through post-hoc re-interpretations that fly in the face of the published statements of the agencies. But more than that, the federal courts need to be reminded that *they* say what the law is in our country, that *they* decide whether the law has been complied with. These are important principles that the Court ought to address in this case.

Wherefore, HCC prays that its petition for a writ of certiorari be granted.

Respectfully submitted,

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